July 2, 2009

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SUPPLEMENTAL REPORT AND DECISION ON REMAND

SUBJECT: Department of Development and Environmental Services File No. **L03SAX04**

FRED AND MERVILYN PENWELL
Reasonable Use Exception Appeal

Location: 25108—121st Court Southwest, Vashon

Appellant: Fred and Mervilyn Penwell
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EXAMINER PROCEEDINGS:

Hearing opened: May 12, 2009
Hearing closed: May 14, 2009

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

A. Procedural History

1. Fred and Mervilyn Penwell submitted a building permit application on January 30, 2001 to construct a single-family residence on an approximately 18,700-square foot lot in the RA-2.5

zone on Vashon Island. The parcel comprises lot 11 within block 3 of the plat of Quartermaster Heights Addition (QHA) and is located at the southeast corner of SW 150th Way and 121st Court SW. The 2001 building permit application proposed to construct a 3,222-square foot residence as depicted within plot plan indicating 4,854 square feet of impervious coverage.

2. The Department of Development and Environmental Services (DDES) Code Enforcement Section issued a notice and order to the Penwells on September 19, 2003, citing the property for clearing and grading in sensitive areas without required permit and approvals. The Penwells filed a timely appeal of the notice and order. Parallel to the code enforcement action DDES also received a Reasonable Use Exception (RUE) application by the Penwells requesting waiver of wetland restrictions. The code enforcement process was held in abeyance pending completion of the RUE review. The Penwells' RUE application was denied by DDES within a decision dated September 3, 2003, which the Penwells appealed.

3. The code enforcement and RUE appeals were consolidated into a single proceeding, which went to hearing on March 15, 2004. On March 24, 2004, the King County Hearing Examiner's Office issued two separate decisions, one for each appeal.

4. Since there was no dispute as to the presence of a wetland on the Penwells' property that encompasses all of lot 11 and Mr. Penwell admitted that he had performed clearing on the lot in 1993, 1997 and 2000, the existence of a clearing and grading violation on the site was not in question. The Examiner's code enforcement decision concluded that although the wetland vegetation on the Penwell property naturally tends to be a forested community, its actual level of development did not warrant providing it with a Class 2 forested wetland status and it should be regulated as a Class 3 wetland. The decision also concluded that the wetland performs valuable functions and that the Penwells' clearing activities did not qualify as a listed exception under the grading code. Accordingly, the March 24, 2004 decision within the notice and order appeal required the Penwells to apply for a grading permit and submit a sensitive areas restoration plan.

5. The Hearing Examiner's RUE decision, also issued on March 24, 2004, discussed the RUE standard for determining the minimum necessary alteration to the wetland sensitive area to allow for reasonable use of the property within the context of the wetland values and functions on the site and the character of surrounding residential development. It also contained considerable discussion of DDES' conclusion that the Penwell RUE application was legally incomplete and linked that discussion within the framework of the Appellants' burden of proof to a 3,000-square foot site disturbance limitation guideline stated in DDES Public Rule 21A-24.022. The Examiner's decision stated that the 3,000-square foot disturbance guideline should be regarded as presumptively valid unless the Penwells satisfied a burden of showing unique circumstances that justified exceeding the 3,000-square foot figure.

6. The 2004 RUE decision also reviewed the Penwell proposal for a 3,322-square foot house footprint, a further 1,532 square feet of impervious surface devoted to carport and driveways and for clearing the remainder of the parcel for yard and garden use within the context of comparing the proposal to existing neighborhood development. County Assessor's records for 25 neighboring parcels were reviewed, with the largest house footprint on the 22 developed parcels identified as comprising 1,660 square feet. Based on 1,660 square feet of house footprint, 600 square feet for carport and 400 square feet for a driveway, the total area of impervious development for a reasonable residential use consistent with neighborhood patterns was determined to be 2,600 square feet, leaving another 400 square feet available for decking and landscaping. The order appended to the Examiner's decision denying the Penwells' appeal gave them the option of either complying with the 3,000-square foot disturbance standard within the public rule guideline or documenting unique circumstances warranting its exceedence.

7. In April 2004, the Penwells filed a timely judicial appeal of both the Hearing Examiner's RUE decision and the contemporaneous code enforcement decision (Snohomish County cause no. 04-2-09028-6). In March of 2005, Superior Court Judge Anita L. Farris rendered her decision regarding the Penwells' various claims under the Land Use Petition Act (LUPA). Judge Farris upheld in its entirety the Examiner's code enforcement decision regarding unauthorized alteration of the wetland, including the requirement for the Penwells to obtain a grading permit and submit a plan to restore those wetland areas lying outside the ultimate RUE envelope. The Judge also ruled that development of the entire Penwell parcel was not the minimum necessary to provide for a reasonable use of the property. A third ruling was that the wetland on the Penwell site has functions and values warranting protection by King County sensitive areas regulations.

8. The Judge determined that the status of the 3,000-square foot development area limitation contained within DDES Public Rule 21A-24.022 was unclear within the county's RUE review process and that if improperly interpreted the 3,000-square foot limit possessed potential constitutional infirmities. This is because circumstances may exist where 3,000 square feet of development area may not be sufficient to confer upon an applicant a reasonable use of property based on a need to preserve a reasonable economic value. Factors that may influence the reasonable use determination include the location and nature of the parcel itself and the use and development of surrounding properties, including the yard space within neighboring parcels. The Judge stated that the public rule needs to be interpreted either as an advisory guide only or should be ignored as conflicting with the requirement to make a determination of reasonable use.

9. Based on the need to obtain further clarification regarding employment of the public rule guideline, Judge Farris remanded the case back to the county so that the Penwells could "propose a plan using less than the full 19,000 square feet and for the county to apply the code and public rule to such proposal consistent" with the Court's ruling.

10. In response to a motion from the Penwells, Judge Farris, on June 3, 2008, issued an order clarifying her previous rulings that restructured the review procedures applicable to the remand process. The Judge ruled that before requesting the Penwells to revise their RUE application DDES first needs to make "an individualized determination of exactly what reasonable use exception it is permitting." After that individualized determination has been made, the Penwells would then be provided have an opportunity to offer a new proposal consistent with the DDES determination or a different proposal beyond its scope.

11. A status conference on the RUE remand was held by the Hearing Examiner's Office on August 11, 2008 and a Status Conference Order was issued on August 13, 2008. The Status Conference Order determined that the Hearing Examiner under the remand retained concurrent jurisdiction with DDES to implement the Judge's order; that the clarification order issued June 3, 2008 vacated *sub silentio* a DDES RUE decision, dated May 9, 2008, that was not appealed by the Penwells; and that the Penwells' notice on title and fee appeal claims raised issues outside the scope of RUE review. It also set a schedule for future procedural actions including deadlines for DDES to make its individualized determination and issue a revised RUE decision.

12. On November 5, 2008, DDES issued its individualized determination defining what alterations to the Penwell wetland sensitive area would be necessary to accommodate the reasonable residential use of the property. This individualized determination was implemented within DDES's revised RUE report and decision dated December 18, 2008.

13. As noted within the DDES RUE decision, the Penwells did not actually submit a revised RUE application site plan showing a building design and yard layout for access, landscaping and amenities. Rather, the Penwells simply proposed some site disturbance totals. Their proposal is

to create up to 55 percent of impervious surfaces for house footprint and driveway (10,285 square feet) and to utilize 83 percent of the lot (15,521 square feet) for all site development including driveways, yard and landscaping. Thus, the total site development area proposed by the Penwells is slightly more than twice the 7,350 square feet specified within DDES individualized determination.

14. The Penwells filed a timely appeal of the December 18, 2008 DDES revised RUE decision. The period leading up to the May 12, 2009 appeal hearing featured rulings by the Hearing Examiner on a number of motions offered by the Penwells' attorney Russell Odell. Some of these motions were rejected summarily, including a demand for a jury trial, motion *in limine* to exclude testimony prior to hearing and for rulings on factual issues subject to dispute. Rulings were also issued that the KCC Chapter 21A.24 Notice on Title provisions do not regulate the alteration of a sensitive area and therefore are not subject to review within the RUE process and that the constitutional takings context underpinning the RUE procedures does not alter the burden of proof within the appeal.

15. Contemporaneously with this RUE appeal the Penwells are also pursuing within a separate proceeding (DDES file no. A08F0017) an appeal of the fees charged by DDES for RUE review. Mr. Odell moved to consolidate the RUE and fee appeals into a single proceeding, a motion that was initially granted but then rescinded after it was discovered that Ordinance 16026, which created the county's fee appeal process, precludes the examiner who hears the fee appeal from also hearing any related permitting applications or appeals. Mr. Odell then filed a motion to reconsolidate the hearings based on an argument that RCW 36.70B.050 governing local project review requires that the process for project permit applications be limited to one open-record hearing plus one closed-record appeal. Mr. Odell's contention that this statutory language supersedes any inconsistent provisions within Ordinance 16026 was rejected on the grounds that fee appeals are not "review of project permit applications" within the meaning of the statute.

16. The latest Penwell RUE appeal, reopened as a consequence of the remand order from the Snohomish County Superior Court in the LUPA action, was convened on May 12, 2009 and concluded on May 14, 2009. The evidential record for the prior Hearing Examiner decision issued in 2004 remains part of the record for the instant remand decision, but to the extent that this report requires supplemental factual findings the new record established within this proceeding will be primarily relied upon. The Hearing Examiner decision issued on March 24, 2004 will be modified and amended as required.

17. There is one historical fact sequence that needs to be clarified at the outset because it is important to the Penwells' legal claims. Mr. Odell's post-hearing brief asserts at page no. 3 that the Penwells bought the two adjacent lots in QHA in 1990 prior to the adoption of a 1993 Sensitive Areas Ordinance (SAO). Both these date references appear to be incorrect. The original King County SAO that undertook to protect and regulate wetlands was adopted effective September 10, 1990 under authority of Ordinance 9614. The Examiner's prior March 24, 2004 decision related at finding no. 5 that the Penwells had purchased the Vashon Island properties in 1991. The later purchase date is confirmed by the Assessor's Office data provided in exhibit 62, which shows lot 11 within block 3 of QHA being sold by the Waters Development Corporation to Fred and Mervilyn Penwell on September 9, 1991 for a sales price of $24,700.

B. Parcel Value and Neighborhood Character

18. Consistent with the Superior Court's clarification order issued on June 3, 2008, DDES made an individualized determination as to what alterations to sensitive area restrictions on the Penwell parcel are required to provide for a reasonable residential use of the property. The clarification

order read in conjunction with the prior May 17, 2005 order effected certain revisions to DDES' standard RUE review process. First, no reference to the presumptive 3,000-square foot maximum disturbance area limit stated within the public rule guideline was entertained. Second, the Penwells were allowed, but not required, to submit new residential development proposal. As noted above, the Penwell proposal at this point consists merely of proposed impervious coverage and development area percentages. Third, the requirement to make an individualized determination has the practical effect of shifting the burden of proof away from the applicant/appellant and onto DDES. The requisite individualized determination was first stated within a November 5, 2008 DDES letter to the Penwells (exhibit 67) and implemented within the DDES revised RUE report and decision dated December 18, 2008.

19. The key conclusions contained within the December 18, 2008 revised RUE report and decision for the 18,700-square foot Penwell parcel are the following:

> "The allowable site disturbance for the Penwell property balances protection of the remaining wetland with residential use of a portion of the property consistent with the average footprint of neighboring residences. The site disturbance would include a building footprint not to exceed the average of the neighboring 10 homes, or 1,582 square feet. The building footprint would include a residence and any parking structure. A 30-foot street setback along both SW 251st Street and 121st Avenue SW would meet the zoning code provisions for this parcel's RA-2.5 zoning, and include the septic tanks and driveway. A maximum of 15 foot building setback would be allowed around the remaining two sides of the house, to be used for lawns, landscaping, sidewalks, patios or decks or other residential amenities…."
>
> "DDES has made the individualized determination that this property may utilize approximately 39% of the lot, or 7,350 square feet. This would include the 30-foot street setbacks, and a maximum 15-foot building setback along the remaining sides of the house…"

20. DDES also updated its observations concerning the wetland that encompasses the Penwell parcel, which seems not have changed fundamentally except that the vegetation is now larger and more dense. The site continues to be colonized by native wetland plants, including alder, willow, Douglas spirea, soft rush and giant horsetail. Some invasives are found near the parcel's northwest corner. The wetland extends onto the parcel directly south, which remains undeveloped.

21. The remand record contains more current information concerning the character of the surrounding QHA neighborhood. The Penwells hired a general contractor, R. Bruce Olsen, to perform estimates as to the extent of development on 25 neighborhood properties. Mr. Olsen used King County Assessor's Office data supplemented by his own observations, most of which were made from adjacent public roads. For the 25 parcels Mr. Olsen derived an average residential footprint of 1,255 square feet, an average lot size of 22,637 square feet, impervious surface coverage of 1,547 square feet, average decking of 300 square feet and an average garage and accessory building coverage of about 425 square feet. Mr. Olsen's average house footprint size is about 325 square feet smaller than the figure used by DDES primarily because he also included seven manufactured homes in his survey.

22. Mr. Olsen also offered an average site disturbance factor for the 25 developed lots of 96.5 percent. A quick glance at exhibit 64, a 2007 aerial photo of the neighborhood with

lot lines superimposed, suggests that this is a misleading figure. Mr. Olsen, who claimed no expertise regarding either native plants or biology, made his site disturbance estimates based on a "rough determination" of original site vegetation remaining. This determination was based on an assumption that the original native cover for the area was a Douglas fir forest and that the continued presence of original vegetation is to be defined by the existence of Douglas firs.

23. Among the neighborhood parcels that Mr. Olsen identified as characterized by 100 percent site disturbance are 25115 122nd Avenue SW (tax lot no. 7004200140), 25140 122nd Avenue SW (tax lot no. 7004200170), 25121 121st Court SW (tax lot no. 7004200230) and 11935 SW 250th Way (tax lot no. 7004200340). The exhibit 64 aerial photograph shows a substantial number of trees on all four of these lots. Moreover, the large trees on the first three of the four lots identified above appear to be parts of bigger groves extending offsite onto undeveloped properties. These larger groves of trees are not readily visible from the public right-of-way. Based on Mr. Olsen's lack of demonstrated botanical expertise, limited viewing opportunities from the public right-of-ways and the conflicts between his testimony and the aerial photographs, we decline to adopt his original vegetation determinations, and the disturbance area estimations based thereon, as accurate.

24. Another realm where considerable new information was offered but reliable patterns are difficult to adduce are in the areas of property valuations and development potential within the QHA neighborhood. Exhibit 62 is a set of Assessor Office printouts dated April 27, 2009 that encompasses 21 of the 25 parcels viewed by Mr. Olsen. If one eliminates mobile homes and properties with less than 1,500 square feet of living space, a cohort of 13 properties remains that can be described as roughly comparable to a reasonable conceptual proposal for development of the Penwell site. These 13 properties have an average residential footprint of 1,371 square feet, an average of 1,952 square feet of living area and an assessed valuation range between $308,000 and $413,000. The average assessed value for the 13 is $356,000 and the median value is $349,000. Eleven of the 13 properties are described as having living space on two levels, most of them likely consisting of a daylight basement.

25. There was considerable agreement between the Penwells' witness Steve Dobson, an associate real estate broker from Renton, and DDES consultant Mark Jenefsky, an architect, as to the major variables influencing the value of housing on the Penwell parcel and within the QHA neighborhood. There was a consensus that a territorial view east toward Puget Sound could be obtained from a second-story on the Penwell parcel, but not from a first-story. It was also agreed that such a view would enhance the value of a residence on the property. There was further agreement that due to the nature of existing development in the neighborhood, there is a value ceiling in the QHA neighborhood above which a residence would be deemed over-built for the area and the marginal return on investment would decrease. Mr. Dobson estimated the ceiling limit for QHA to be in the $300,000 to $315,000 range based on a home of between 1,500 and 1,600 square feet. In his opinion, houses in this location above that size and value would experience diminishing returns on investment.

26. According to Mr. Dobson's investigations immediately prior to the hearing, the Multiple Listing Service (MLS) shows three properties currently for sale in QHA. These include a three-bedroom, doublewide manufactured home on a 12,400-square foot lot located two parcels south of the Penwell property at 25124 121st Court SW. This property has a listing price of $265,000 and a current assessed value of $204,000. Two lots directly

east of the Penwell property at 25115 122nd Avenue SW is a three-bedroom house with 2,180 square feet of living space on a 23,087-square foot lot, which the MLS data sheet claims has a view of the harbor. It is listed for $324,900 and carries a current assessed value of $334,000. Finally, at 12212 SW 250th Way lies a three-bedroom house on a 22,651-square foot lot with 1660 square feet of living space that is listed for $319,000 and carries an assessed valuation of $313,000. According to Mr. Dobson this third property has a sale pending under an earnest money agreement.

27. Mr. Dobson also recounted his efforts in late 2001 and 2002 to sell the Penwell parcel. Lot 11 was listed for a total of 444 days, first at $20,000 then reduced to $15,000. Mr. Dobson stated that interested potential buyers were discouraged by the presence of a wetland sensitive area dominating the site, although he did not specify how much of the problem was simply the wetland and how much the ongoing controversy over the wetland between Mr. Penwell and DDES.

28. The Penwells also offered the testimony of Thomas Love, who supervised the work done by an appraiser within his office, Zena LaRosa. Ms. LaRosa's appraisal attempted to compare a hypothetical house on the Penwell parcel having 2,182 square feet of gross living area and 1,263 square feet of unfinished basement with five comparable sales on Vashon Island. Based on these comparisons, as adjusted, the appraisal concluded that the hypothetical Penwell residence would have a market value of approximately $450,000.

29. With all due respect to Mr. Love, it is difficult to see where this appraisal effort provides reliable information. Even assuming that an appraisal based on a hypothetical structure can produce valid information, there are still too many problems to overcome. First, the comparables were evaluated on June 11, 2008, based on sales that occurred between October 31, 2007 and May 8, 2008. In a rapidly declining national real estate market these sales figures, all of them more than a year old, no longer offer reliable information. Second, none of the comparables were within the QHA neighborhood. While use of the main part of Vashon Island as a basis for comparable sales may be defensible, in point of fact four of the five comparables are located on the eastern extension of Vashon Island, known as Maury Island. We are not prepared to accept that sales on Maury Island are valid comparables for mainland Vashon Island without supporting testimony substantiating such conclusion. Finally, the Penwells' own witness Steve Dobson testified to a ceiling for maximizing development value within QHA at less than $325,000, with average comparable assessed valuations in the neighborhood falling in the $350,000 range, facts which would tend to disqualify as comparable sales properties valued more than $100,000 higher.

30. While Mr. Penwell's personal preference may be for a single-story residence, there is no reason to conclude that a two-story house on his property would not be economically viable. On the contrary, a two-story house would enhance value by accessing water views to the east, reducing foundation and roof construction costs and freeing up more space for yard amenities. Based on the evidence in this proceeding, the economically optimal residential development on this lot in this neighborhood would likely be a two-story residence on a 900-square foot footprint with 1,800 square feet of living space.

31. The more difficult part of this remand review process is to get a handle on the question of what sort of yard space needs to be provided in support of single-family residential development in this location to provide a reasonable use of the property. Yard and landscaping requirements are not part of the county's ordinance-mandated RUE process

nor are they a factor specified within the Assessor's estimations of property values. Moreover, to the best of this Examiner's knowledge there are no federal or state takings cases that deal even implicitly with reasonable yard requirements. Thus it comes as no surprise that DDES in its remand process did not make an individualized determination as to reasonable yard use on the Penwell property.

32. What DDES did do was to provide the Penwells with full use of the zoning-mandated 30-foot street setbacks on two sides of their corner lot and the standard sensitive areas 15-foot building setback on the other two sides. This resulted in a nominal 100-foot by 75-foot development envelope, which the DDES RUE decision estimated to encompass 7,350 square feet based on the slightly irregular shape of the lot. In addition, along the two interior building setback lines DDES in a conceptual diagram attached to its staff report proposed maintaining fire protection area at about 1,900 square feet. If, however, the fire protection survival space were expanded to a 30-foot width beyond the building setback line, the additional protection zone would increase to 6,150 feet, providing nearly 12,000 square feet of yard space subject to some level of active landscaping maintenance. In other words, there could be approximately 6,000 square feet of yard subject to intensive use within the setback areas and another approximately 6,000 square feet of interior perimeter area under wetland protection but also subject to management to reduce fire hazards.

33. As described above, the optimal development concept in terms of maximizing economic value in this neighborhood at this location would be a two-story residence with a total living area of approximately 1,800 square feet, which would both take advantage of the property's view potential and expand the available yard area. If one posits a 7,350-square foot site disturbance envelope with a two-story house on a 900-square foot bottom floor footprint, the quantity of intensely developed yard space could be increased from 5,760 square feet to 6,450 square feet.

C. Fire Safety

34. The Penwell RUE appeal raises two public health and safety issues. The more serious is whether a requirement to retain native wetland vegetation on a residential lot presents an unacceptable fire safety risk. Judith Cooke, a National Fire Protection Association (NFPA) consultant involved with its Firewise program, described the process by which NFPA has determined that in wooded areas a 30-foot survival space needs to be maintained around residences in order to protect them from radiant heat-generated fire risk. In this survival space fuel buildup should be eliminated, dense tree clusters thinned, hazardous trees removed and underbrush minimized. In addition, the NFPA literature describes further concentric zones beyond the essential survival space designation that can also benefit from management to eliminate risk.

35. Ms. Cooke visited the Penwell site and identified risk factors at that location as including the density of vegetation mass, the site slope and the fact that the neighborhood is served by a single access route. A positive factor is that the tree cover on the Penwell site is dominated by alders, which tend to be fire resistant.

36. The Puget Sound area has not been classified as a high fire risk area, and no one could recall the last time a wildfire threatened suburbanized areas of King County. Nonetheless, DDES agreed that the wetland restoration plan that is required as a consequence of the code enforcement action can be formulated to include a Firewise component. This means that the vegetative density mass can be reduced within the 30-

foot survival space and fire resistant native species planted. A condition implementing this incorporation of Firewise guidelines into the wetland restoration plan will be appended to the RUE permit approval. A 30-foot survival space managed for fire risk control located outside the 15-foot building setback line provides a potential 45 feet of effective fire safety management.

D. Vermin

37. The notice and statement of appeal filed on behalf of the Penwells on January 5, 2009 asserts that "Mr. and Mrs. Penwells' health and safety are threatened by known vermin and health hazards associated with living in close proximity to wetlands." Vermin are defined by the American Heritage Dictionary, Second College Edition, as "any of various small animals or insects that are destructive, annoying, or injurious to health, as cockroaches or rats." A secondary meaning includes "a contemptible or offensive person."

38. According to Mr. Penwell's hearing testimony the creatures that he is concerned with encompasses both certain pests themselves as well as other animals that are the carriers of pests or disease. These include, in no particular order, insects, fleas, rats, ticks, heartworm, mosquitoes, deer, raccoons and mold. In addition to rats, mosquitoes and deer that may carry other insects or pathogens, Mr. Penwell also has a concern that animal waste transmits disease. He further opined that a dense wetland would provide a place for criminals to hide.

39. Mr. Penwell did not testify to having actually observed any of the cited menaces on his property, he did not claim to be a biologist, nor to posses any particular expertise in this area. From his autobiographical statements it appears that he grew up in the Rocky Mountain States and went into the construction business straight out of high school.

CONCLUSIONS:

1. The primary context for review within this supplemental RUE report and decision are the various rulings and stipulations memorialized within the remand orders issued in the LUPA appeal under Snohomish County cause no. 04-2-09028-6. These include universal agreement that single-family residential development is the only reasonable use of the Penwell parcel, that the county ordinances applicable to this review are those that were in effect in 2003 when the RUE application was submitted, and the Judge's rulings that a "proposal to develop the entire lot is not the minimum development necessary to allow for reasonable use of the property" and the wetland on the Penwell property "has functions and values that warrant protection under the King County Code." The Judge also ruled that the 3,000-square foot disturbance limit described in DDES Public Rule 21A-24.022 possesses constitutional infirmities and should not be applied. Instead, DDES on remand, and the Hearing Examiner on further appeal, were instructed to make "an individualized determination as to exactly what alterations to the sensitive area restrictions are necessary to permit reasonable use of this property."

2. The Court's instruction to DDES to make an affirmative individualized determination by implication alters the review procedures normally applicable to a RUE application. It requires DDES to make its reasonable determination in the absence of any specific development plan or proposal from the applicant and excuses the applicant from any meaningful semblance of a burden of proof. In short, DDES has a responsibility to make its individualized determination notwithstanding any lack of information or other deficiencies within the RUE application. A

central issue within this appeal is, therefore, simply the matter of determining the legal adequacy of the DDES individualized determination for the Penwell parcel.

3. A second set of issues raised by the Superior Court remand order concerns the proper scope of the term "reasonable use." The definition provided within the county zoning code identifies the term's origin in federal and state takings jurisprudence, but fails to assign to it any substantive content. On this point the only meaningful state takings case that the Examiner was able to discover was *Berst vs. Snohomish County*, 114 Wn. App. 245 (2002), which generally equated the term reasonable use with "economic impact or investment backed expectations" (Wn. App. at 257).

4. The broadest discussion of the term "reasonable use" appears in *Buechel vs. State Department of Ecology*, 125 Wn.2d 196 (1994), in which the Washington Supreme Court analyzed the term as interpreted within a Mason County variance ordinance. The Court stated that "the size, location and physical attributes of a piece of property are relevant when deciding what is a reasonable use of a particular parcel of land" and "to some extent, the reasonable use of property depends on the expectations of the land owner at the time of purchase of the property" (125 Wn.2d at 209). The Court also allowed that in dealing with owner expectations one may "look to the zoning regulations in effect at the time of purchase as a factor to determine what is reasonable use of the land" (125 Wn.2d at 210). The Court's discussion then proceeded to describe actual uses being made by nearby properties. The *Buechel* opinion also stated at the outset that the property owner's action did not raise a constitutional taking issue (125 Wn.2d at 200).

5. The federal cases provide almost no direct guidance in defining the term "reasonable use" within the takings context. These cases tend to avoid following a set formula, preferring to identify a range of potentially relevant factors such as the economic impact of the regulation on the claimant and the extent to which regulation interferes with distinct investment backed expectations.

6. A federal case that is instructive by way of example is the United States Supreme Court decision in *Palazollo vs. Rhode Island*, 533 US 606 (2001), which reviewed a Rhode Island Supreme Court case restricting residential development on coastal wetlands. The applicant proposed to fill 11 of 18 wetland acres to create a 74 lot residential subdivision. The State Supreme Court decision restricted development to one upland parcel with a development value of $200,000. The developer's lawsuit against the state sought $3,150,000 in damages based on an appraiser's estimate as to the value of the 74 lot residential subdivision.

7. The US Supreme Court ruled that the Rhode Island Court had not committed a takings when it "held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved":

> "On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains $200,000 in development value under the State's wetland regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in Lucas 'by the simple expedient of leaving the landowner a few crumbs of value'" (citation omitted).
>
> "Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation

> permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle'" (citation omitted)….
>
> "The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence."

8. In terms of percentages, the *Palazollo* Court upheld a state regulation in the face of a takings challenge where only 1.35 percent of the original development proposal was permitted (one lot out of 74 requested) and where the market value of the resultant development was only 6.34 percent of the appraised worth of the total proposal. What this appears to tell us is that, in the federal context at least, a takings claim deals with absolute economic values, not relative ones. One $200,000 lot on 18 shoreline acres was deemed a meaningful economically beneficial use notwithstanding that a much larger proposal with much greater value was prohibited by the state regulation.

9. It is probably fair to say that the county's RUE decisions collectively tend to approve proposals that substantially exceed any known minimum constitutional takings requirements. In so doing they follow the lead of *Beuchel* noted above. It also seems probable that the language within *Beuchel* has informed the Superior Court remand orders to the extent that such orders talk about "whether the economic value of the property is substantially lost…in light of surrounding properties, the location and nature of the property" and "a significant yard or at least the ability to thin a forest at the walls of a building for light may be necessary to warrant any reasonable economic value of a property…because they are consistent with surrounding properties and necessary to be able to sell the property in that location."

10. The fundamental issue to be determined within this remand proceeding is whether the individualized determination performed by DDES provides to the Penwells a reasonable single-family use of their property. As noted above, the DDES determination provides to the Penwells an approximately 7,500-square foot disturbance area plus some ability to control perimeter wetland vegetation through the required wetland restoration plan to achieve fire safety goals. The Appellants have focused considerable attention on impervious surface percentages, but this emphasis is misplaced. Impervious surface coverage is primarily relevant to the drainage analysis performed at building permit review and cannot really be addressed until a specific development proposal has been submitted. While impervious surfaces are by definition developed areas for purposes of the RUE analysis, they are not a separate component of the RUE review. There is no vested right to develop a parcel to the impervious surface maximum limit allowed within the zoning designation if such impervious surface development is proposed within a sensitive area.

11. DDES has identified within its individualized determination a building footprint on the Penwell parcel of 1,582 square feet based on 10 similar properties within the neighborhood. This exceeds by some 300 square feet the footprint average for QHA as a whole if mobile homes are included. This footprint is more than adequate to provide for a reasonable use of the Penwell property, particularly in light of testimony from the Penwells' own witnesses that maximizing economic value on the parcel would be achieved by building a two-story house which takes advantage of its view potential. A 1,582-square foot building footprint is adequate to support a two-story residence in excess of 3,000 square feet of living area. A smaller two-story house more in keeping with the neighborhood development pattern and economic character could be built on a footprint of 1,000 square feet or less, thus freeing up more space for yard use.

12. There are no applicable legal standards for evaluating the size and nature of a yard necessary for a reasonable use of a residential lot. The DDES individualized determination as represented through its hypothetical conceptual plan provides within the zoning and building setback areas for this corner lot nearly 6,000 square feet of yard space. While this amount may be less than the neighborhood average, there are nonetheless about a half-dozen houses within QHA with yards dominated by native trees. There is no evidence that the values of these properties are measurably less than properties with more cleared yard space. This neighborhood has large lots and five or six-thousand square feet of intensively used yard space is a substantial absolute quantity even if it may not be a high percentage of the total lot area.

13. The record shows that the Penwells purchased lot 12 within QHA in 1991 after the enactment of King County's 1990 SAO that imposed the restrictions on development of the wetland that encompasses their property. Therefore, the Penwells' distinct investment backed expectations in 1991 did not include clearing and grading the entirety of their wetland lot. The RUE process and the constitutional principles underlying it guarantee to the Penwells a reasonable economic use of their property. No authority exists for the proposition that they have a constitutional right to fulfillment of all their subjective development desires. The optimal economic use of the Penwell parcel, with or without the presence of wetlands, at this location and in this neighborhood is for a two-story dwelling on approximately a 900-square foot footprint with 1,800 square feet of living space to create a market value between $300,000 and $400,000. The DDES individualized determination allows this level of development to occur with plenty of room to spare. The DDES individualized determination therefore provides for a reasonable use of the Penwell property.

14. DDES has agreed that on this wooded lot a fire safety survival space within the surrounding wetland area is warranted. Reduction of vegetative mass within a 30-foot wide fire safety survival space will be implemented through the conditions of this approval via the wetland restoration plan required pursuant to the code enforcement appeal heard concurrently with the RUE appeal in 2004.

15. There is no competent objective evidence within the record to support the Appellants' contention that wetland vermin on their property pose a health and safety risk.

16. This Supplemental Report and Decision on Remand requires the following modifications to the findings stated within the March 24, 2004 decision originally issued in this proceeding. Findings 1-3 and 5-10 are retained as originally stated. Findings 12-17 are deleted in their entirety. Finding no. 4 is revised to read as follows:

> In response to a motion therefore filed by the Penwells' attorney, the hearings on the code enforcement and RUE appeals were consolidated into a single proceeding and a pre-hearing order issued November 25, 2003 defining the RUE appeal issues.

Within finding 11 the last sentence thereof is deleted. The remainder of finding 11 continues in effect.

17. Within the March 24, 2004 report and decision conclusions 1, 3-7 and 10 are retained as originally stated. Conclusions 2, 8, 9, 11 and 12 are deleted.

DECISION:

An RUE for construction of a single-family residence on the Penwell parcel located at 25108 121st Court SW, Vashon Island, is APPROVED, subject to the following conditions:

1. The site disturbance envelope authorized by this RUE shall not exceed 7,500 square feet and shall be located in the northwest quadrant of the site adjacent to the SW 250th Way/121st Court SW intersection. The yard area shall include the 30-foot setbacks along each of the two streets and the 15-foot building setback along the two interior envelope lines. The approved envelope shall conform generally to the conceptual site plan shown as attachment 8 to the DDES staff report (exhibit 70), except as modified pursuant to the permit conditions stated below.

2. The exhibit 70 conceptual plan is based on a 100-foot by 75-foot disturbance envelope containing a 53-foot by 30-foot residential footprint. The Applicant may opt to reconfigure the site disturbance envelope and the building footprint at the time of building permit submission so long as the following requirements are met:

   A. the site disturbance envelope remains adjacent to the northwest property corner;

   B. the minimum 30-foot street and 15-foot sensitive area building setbacks are maintained free of structural encroachments;

   C. the residential building footprint does not exceed 1,590 square feet; and

   D. the total area of the site disturbance envelope does not exceed 7,500 square feet.

3. In order to implement fire safety enhancement, as part of the sensitive areas restoration plan required by the code enforcement appeal decision issued under file no. E0100770, the Applicant may propose, subject to DDES review and approval, tree thinning, underbrush and debris removal, and alternative native wetland species plantings within a 30-foot wide survival space located adjacent to the two interior lines of the 7,500-square foot site disturbance envelope.

4. With the residential building permit application, the applicant shall also submit a plan for mitigation of wetland impacts at a 1:1 ratio for the area of proposed site disturbance. An offsite mitigation location will be required because onsite mitigation is not feasible due to the onsite corrective action already necessitated by the code enforcement proceeding.

ORDERED this 2nd day of July, 2009.

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Stafford L. Smith
King County Hearing Examiner *pro tem*

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within 21 days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE MARCH 15, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0100770/L03SAX04.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Sherie Sabour, Greg Sutton, Richelle Rose, Jon Sloan, Randy Sandin and Pesha Klein, representing the Department; Diana Kirchheim, representing the Appellant; and Steve Dobson, Fred Penwell and Anthony Roth.

The following exhibits were offered and entered into the record:

Exhibit No. 1	DDES Staff Report on E0100770
Exhibit No. 2	Plot Plan for B01L0104, parcel 700420-0270 located at 25112 121st Avenue SW
Exhibit No. 3	Letter to the Penwells from DDES dated May 22, 2001 requesting additional information to continue review of B01L0104
Exhibit No. 4	Code Enforcement Case E0100770 acknowledgement notes
Exhibit No. 5	Letter to the Penwells from DDES dated June 20, 2001 requesting additional drainage and flood plain information
Exhibit No. 6	Letter to Fred White from the Penwells dated July 2, 2001 regarding quit claim of property to the county
Exhibit No. 7	Penwell October 4, 2001 letter to Pesha Klein asking for a time extension to submit additional information requested in May
Exhibit No. 8	Application for RUE L03SAX04 to construct a residence in the wetland
Exhibit No. 9	Tony Roth wetland report prepared for the Penwell property
Exhibit No. 10	Letter to the Penwells from DDES dated June 18, 2003 requesting corrected and additional information to review the RUE
Exhibit No. 11	RUE record and decision for L03SAX04 including the Penwell August 18, 2003 letter responding to the DDES June 8, 2003 letter
Exhibit No. 12	September 19, 2003 Notice and Order for E0100770
Exhibit No. 13	September 23, 2003 Notice of Appeal of the L03SAX04 RUE decision
Exhibit No. 14	September 29, 2003 Statement of Appeal of the L03SAX04 RUE decision
Exhibit No. 15	October 8, 2003 Notice of Appeal of the Notice and Order E0100770
Exhibit No. 16	October 13, 2003 Notice of Pre-Hearing Conference
Exhibit No. 17	October 14, 2003 Statement of Appeal of the Notice and Order E0100770
Exhibit No. 18	October 29, 2003 Motion to Consolidate Proceedings for E0100770 & L03SAX04
Exhibit No. 19	October 31, 2003 Notice of Continued Pre-Hearing Conference for L03SAX04
Exhibit No. 20	November 5, 2003 DDES response to Appellants' Motion to Consolidate
Exhibit No. 21	November 25, 2003 Pre-hearing Order and notice of hearing
Exhibit No. 22	December 4, 2003 Elizabeth Deraitus email to the Hearing Examiner reducing sensitive areas issues to wetland issues
Exhibit No. 23	January 5, 2004 Notice of Rescheduled Public Hearing
Exhibit No. 24	Kroll Map page showing the subject property
Exhibit No. 25	DDES GIS map showing probable sensitive areas on and near the property
Exhibit No. 26	DDES GIS map showing 2000 aerial photo of the property
Exhibit No. 27	Collection of DDES Aerial Photos and site visit photos
Exhibit No. 28	Tax parcel and situs information from KC DDES computer files
Exhibit No. 29	File case notes from DDES Permits Plus computer files
Exhibit No. 30	Site map showing location of the property
Exhibit No. 31	Section 16.82 Grading Code
Exhibit No. 32	King County Code 21A.06.1415 providing a definition of wetlands
Exhibit No. 33	King County Code 21A.24.320-.340 Environmentally Sensitive Areas dealing with wetlands
Exhibit No. 34	King County witness list for the March 15, 2004 hearing

Exhibit No. 35	DDES Reasonable Use File L03SAX04
Exhibit No. 36	Assessors Map Section 24, Township 22 North, Range 2 East
Exhibit No. 37	Letter dated November 20, 2000 from Greg Kipp to Robert D. Johns, *Not admitted into the record*
Exhibit No. 38	Letter dated September 25, 2995 from Randy Sandin to Anthony Roth, *Not admitted into the record*
Exhibit No. 39	Letter dated September 27, 2003 from Cornerstone Geotechnical, Inc. to Diana Kirchheim
Exhibit No. 40	Letter dated June 12, 2001 from Michelle Macias to Mr & Mrs. Penwell
Exhibit No. 41	Email dated January 9, 2003 from Pesha Klein to Steve Bottheim, Greg Borba and Jon Sloan regarding pre-app request A02PM106
Exhibit No. 42	Email dated May 22, 2002 from Pesha Klein to Roger Brucksehn
Exhibit No. 43	Penwell rough budget from J.S. Jones & Associates, Inc. dated June 20, 2001
Exhibit No. 44	Email dated December 3, 2002 from Fred Penwell to Joelyn Higgins,Gary Downing and Pesha Klein
Exhibit No. 45	Email dated January 17, 2002 from Pesha Klein to Gay Johnson
Exhibit No. 46	Email dated January 14, 2002 from Pesha Klein to Fred White, Bill Harm and Gay Johnson
Exhibit No. 47	Email dated December 21, 2001 from Pesha Klein to Fred White and Bill Harm
Exhibit No. 48	Recorded plat of Quartermaster Heights
Exhibit No. 49	Fax from Mr. Penwell to Steve Bottheim, Sherie Sabour and Jon Sloan dated July 4, 2003
Exhibit No. 50	Letter dated July 16, 2003 to Mr. Penwell from Greg Borba
Exhibit No. 51	Permits Plus comment on the pre-application meeting held with the applicant on January 16, 2003
Exhibit No. 52	Email to Pesha Klein from Sherie Sabour dated May 15, 2003
Exhibit No. 53	August 18, 2003 letter with attachments (photos & letters)
Exhibit No. 54	Photos taken by Fred Penwell of surrounding lots (taken September 7, 2003)
Exhibit No. 55	2003 aerial photo
Exhibit No. 56	Photo dated July 10, 1990 by Walker & Associates
Exhibit No. 57	Photo dated October 6, 2000 by Walker & Associates
Exhibit No. 58	Walker & Associates dated May 4, 1980
Exhibit No. 59	Statement from Pre-Application Meeting with GIS & Permits Plus Information

MINUTES OF THE MAY 12, 2009, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L03SAX04

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Devon Shannon representing the Department; Russell Odell representing the Appellant; Chad Tibbits, Fred Penwell, Jon Sloan, Judith Cook, Rodney Bruce Olson, Steve Dobson, Laura Casey, Steve Bottheim, John Klopfenstein, Mark Jenefsky and Thomas Love.

The following Exhibits were offered and entered into the record:

Exhibit No. 60	Department of Development and Environmental Services (DDES) file for L03SAX04
Exhibit No. 61	May 8, 2009 iMAP of subject parcel and surrounding area
Exhibit No. 62	King County Assessor records for homes surrounding subject parcel
Exhibit No. 63	April 24, 2009 iMAP of subject parcel and surrounding area annotated to incorporate assessor measurements of lots and homes
Exhibit No. 64	April 27, 2009 iMAP aerial photograph of subject parcel and surrounding area

Exhibit No. 65	Snohomish County Superior Court Decision Memorandum for *Fred Penwell and Mervilyn Penwell v. King County*, 04-2-09028-6, issued by Judge Anita L. Farrison March 1, 2005
Exhibit No. 66	Order Clarifying May 17, 2005 Order, issued June 2, 2008
Exhibit No. 67	DDES individualized determination issued to the Penwells on November 5, 2008
Exhibit No. 68	Penwells' application for Reasonable Use Exception (RUE) submitted November 26, 2008
Exhibit No. 69	DDES RUE Report and Decision issued December 18, 2008
Exhibit No. 70	DDES staff report to the Hearing Examiner for L03SAX04 transmitted May 5, 2009
Exhibit No. 71	Permit at a glance for permit no. L02AP006, printed May 12, 2009, *Not admitted*
Exhibit No. 72	Uniform Residential Appraisal Reports for subject parcel performed by Love Appraisal Service in June 2008
Exhibit No. 73	Declarations of neighbors regarding their properties, i.e. addresses, parcel numbers, size of: lot, first floor square footage, garage, porch, deck and lot size minus structures
Exhibit No. 74	DDES letter, dated January 24, 2008, to Penwells in response to their October 11, 2007 submittal
Exhibit No. 75	Email from Randy Sandin to Steve Bottheim, Jon Sloan and Chad Tibbits dated May 16, 2008 regarding status of Snohomish County Superior Court case
Exhibit No. 76	DDES Hourly Charges Detail for project B01L0104, dated September 30, 2008
Exhibit No. 77	"Be Firewise: Fire safety tips for rural homeowners" brochure published by King County Department of Natural Resources
Exhibit No. 78	"Firewise Construction Checklist"
Exhibit No. 79	iMAP of subject parcel and surrounding area annotated to include parcel and house address numbers
Exhibit No. 80	Example of general contractor estimate for building a home on the subject parcel prepared by Rodney Bruce Olson

The following Exhibits were offered and entered into the record on May 13, 2009:

Exhibit No. 81	Letter (without attachment) from Eric Stahlfeld, on behalf of Penwells, to DDES on July 2, 2001 regarding status of Penwell parcel
Exhibit No. 82	RUE Report and Decision dated November 30, 2000, for applicants King County Water District No. 90
Exhibit No. 83	DDES RUE Report and Decision dated September 7, 2001, for applicant Ali Amin
Exhibit No. 84	DDES RUE Report and Decision dated March 13, 2002, for applicant Gordon Lewis
Exhibit No. 85	DDES RUE Report and Decision dated February 29, 2000, for applicant Rod Skaar
Exhibit No. 86	DDES RUE Report and Decision dated September 1, 1999, for applicant Ovidiu M. Elenes
Exhibit No. 87	DDES RUE Report and Decision dated September 3, 1999, for applicants Dan French/Austin Royce D/B Inc.
Exhibit No. 88	DDES RUE Report and Decision dated September 15, 2000, for applicant Delores Lane
Exhibit No. 89	Hearing Examiner Report and Decision dated January 3, 2005, for RUE Appeal L04SAX04 Seaspect, Inc.
Exhibit No. 90	Residential Agent Summaries with Tax Reports for surrounding properties, submitted by Steve Dobson
Exhibit No. 91	"Fire-resistant Plants for Home Landscapes" booklet, published in August 2006 and researched by Oregon and Washington State Universities and the University of Idaho

Exhibit No. 92 "Be Firewise: Fire safety tips for rural homeowners" brochure published by King County Department of Natural Resources

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